APPENDIX A

OPINION OF THE COURT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13007
DISTRICT OF COLUMBIA, PETITIONER
v.
THE WASHINGTON POST COMPANY, RESPONDENT

No. 13008
DISTRICT OF COLUMBIA, PETITIONER
v.
WASHINGTON TIMES-HERALD, INC., RESPONDENT

No. 13009
DISTRICT OF COLUMBIA, PETITIONER
v.
THE WASHINGTON POST COMPANY, RESPONDENT

On Petitions for Review of Decisions of the
District of Columbia Tax Court

Decided June 14, 1956

Mr. Henry Wixon, Assistant Corporation Counsel for the District of Columbia, submitted on the brief for Petitioner, *Messrs. Vernon E. West*, Corporation Counsel, *Chester H. Gray*, Principal Assistant Corporation Counsel, and *George C. Updegraff*, Assistant Corporation Counsel, were on the brief for Petitioner.

Mr. Fontaine C. Bradley, with whom *Mr. H. Marshall Peter* was on the brief, submitted on the brief for Respondents.

Before EDGERTON, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

PER CURIAM: Petitioner's principal though not its only contention is that *Washington Times-Herald, Inc.* v. *District of Columbia*, 94 U.S. App. D.C. 154, 213 F. 2d 23, should be overruled. That case was decided by the court *in banc*. Before the present case was set for hearing, the petitioner had moved for a hearing *in banc*, largely on the ground of an alleged conflict between the *Times-Herald* case and the earlier case of *Myer* v. *Washington Times Co.*, 64 App. D.C. 213, 76 F. 2d 988, *cert. denied*, 295 U.S. 734. That motion had been denied. When this case was called for hearing, we informed counsel that this division of the court could not overrule the *in banc Times-Herald* case and therefore would not hear argument that it should be overruled. Counsel then elected in open court to submit the present case on the brief.

Thereafter counsel filed a "Motion to vacate order denying petitioner's motion for hearing en banc and for hearing en banc." In this motion, which has been denied, counsel says we advised him at the hearing "that the Division would not permit counsel for petitioner to present to the Division argument concerning the liability of respondents for District of Columbia sales and use taxes as raised by petitioner on the appeals of the above-entitled cases to the United States Court of Appeals for the District of Columbia Circuit, for the reason that the Division of this Court was without authority to overrule the decision of this Court sitting en banc in the case of *Washington Times-Herald, Inc.* v. *District of Columbia*, 94 U. S. App. D. C. 154, 213 F. 2d 23." That may have been the practical effect of what we said but is not what we said. We assured counsel we would hear him fully on all

his contentions, except only his contention that the *Times-Herald* case should be overruled. With that exception, we have now considered all his contentions. We find no error affecting substantial rights.

Affirmed.

JUDGMENT OF THE COURT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Filed June 14, 1956
JOSEPH W. STEWART, *Clerk*
APRIL TERM, 1956
Docket No. 1494
No. 13007
DISTRICT OF COLUMBIA, PETITIONER
v.
THE WASHINGTON POST COMPANY, RESPONDENT

APRIL TERM, 1956
Docket No. 1495
No. 13008
DISTRICT OF COLUMBIA, PETITIONER
v.
WASHINGTON TIMES-HERALD, INC., RESPONDENT

APRIL TERM, 1956
Docket No. 1497
No. 13009
DISTRICT OF COLUMBIA, PETITIONER
v.
THE WASHINGTON POST COMPANY, RESPONDENT

On Petitions for Review of Decisions of the District of Columbia Tax Court

Before: EDGERTON, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

JUDGMENT

These cases came on to be heard on the record from the District of Columbia Tax Court, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the decisions of the said Tax Court on review herein be, and the same are hereby, affirmed, with costs.

Dated: June 14, 1956.

Per Curiam.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America, Vol. 1, U.S. Code, p. XLIV:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES INVOLVED

The statutes involved are:

(1) Those statutes which impose in the District of Columbia sales taxes and compensating use taxes on the sale and purchase of personal property and services, as defined in the District of Columbia Sales Tax Act and the District of Columbia Use Tax Act and,

(2) The Statute which created and defines the authority of the District of Columbia Tax Court, and,

(3) The statutes relating to United States Circuit Courts of Appeal.

1.

The following provisions of the District of Columbia Sales Tax Act, 63 Stat. 112, ch. 146, and the District of Colum-

bia Use Tax Act, 63 Stat. 124, ch. 146 (Title 47, ch. 26 and ch. 27, D.C. Code, 1951) are involved:

District of Columbia Sales Tax Act:

Sections 116(a), 119, 141(a) (Secs. 47-2601-16, 47-2601-19, 47-2618(a), D.C. Code, 1951).[1]

"Sec. 116. (a) 'Sales price' means the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

"(1) The cost of the property sold.

"(2) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

"(3) The cost of transportation of the property prior to its sale at retail. The total amount of the sales price includes all of the following: a. Any services that are a part of the sale. b. Any amount for which credit is given to the purchaser by the vendor.

* * *

"Sec. 119. 'Tangible personal property' means corporeal personal property of any nature.

* * *

"Sec. 141. (a) Any vendor or purchaser aggrieved by a final determination of tax or denial of an application for refund of any tax may, within ninety days from the date of the final determination of the tax or from the date of the denial of an application for refund, as the case may be, appeal to the Board of Tax Appeals for the District of Columbia in the same manner and to the same extent as set forth in sections 3, 4, 7, 8, 9, 10, and 11 of title IX of the Act entitled 'An Act to amend the District of Columbia Revenue Act of 1937, and for other purposes', approved August 17, 1937, as amended, and as the

[1] These provisions of the District of Columbia Sales Tax Act are applicable to the District of Columbia Use Tax Act by Section 210 of the District of Columbia Use Tax Act (Sec. 47-2701-10, D.C. Code, 1951).

same may hereafter be amended. The remedy provided in this section shall not be deemed to take away from the taxpayer any remedy which he might have under any other provision of law, but no suit by the taxpayer for the recovery of any part of any tax shall be instituted in any court if the taxpayer has elected to file an appeal with respect to such tax with the Board of Tax Appeals for the District of Columbia."

* * *

District of Columbia Use Tax Act:

Sections 201(a), and 201(b) (3), 202, 203, 206, and 212, District of Columbia Use Tax Act (Secs. 47-2701(a) and (b), (3), 47-2701-2, 47-2701-3, 47-2701-6, 47-2702, D.C. Code, 1951).

"Section 201. (a) 'Retail sale', 'sale at retail', and 'sold at retail' means all sales in any quantity or quantities of tangible personal property, whether made within or without the District, and services, to any person for the purpose of use, storage, or consumption, within the District, taxable under the terms of this title. These terms shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received by him, or to use or incorporate the property so transferred as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining. For the purpose of the tax imposed by this title, these terms shall include but shall not be limited to, the following:

* * *

"(b) The terms 'retail sale', 'sale at retail', and 'sold at retail' shall not include the following:

* * *

"(3) Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made.

* * *

"Sec. 202. 'Purchase' and 'purchased' shall mean and include—

"(a) any transfer, either conditionally or absolutely, of title or possession or both of the tangible personal property sold at retail;

"(b) any acquisition of a license or other authority to use, store, or consume, the tangible personal property sold at retail;

"(c) any sale of services sold at retail.

"Sec. 203. 'Purchaser' means any person who shall have purchased tangible personal property or services sold at retail.

* * *

"Sec. 206. 'Use' means the exercise by any person within the District of any right or power over tangible personal property and services sold at retail, whether purchased within or without the District by a purchaser from a vendor.

* * *

"Sec. 212. Beginning on and after the first day of the first month succeeding the sixtieth day after the approval of this Act, there is hereby imposed and there shall be paid by every vendor engaging in business in the District and by every purchaser a tax on the use, storage, or consumption of any tangible personal property and services sold or purchased at retail sale. The tax hereby imposed shall be at the rate of 2 per centum of the sales price of the tangible personal property or services rendered or sold."

* * *

2.

Sections 1, 3, 4(a), (c), (d), (e), (f), (g), 8 and 9, of the Act of August 17, 1937 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223, and as amended by Sec. 3(b) and Sec. 5 of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Secs. 47-2401, 47-2403, 47-

2404, 47-2408, 47-2409, D.C. Code, 1951, as supplemented by Supplement IV), pertaining to the District of Columbia Tax Court, are involved:

"Sec. 1. In the interpretation of this title, unless the context indicates a different meaning— * * * the word 'court' shall mean the United States Court of Appeals for the District of Columbia.

* * *

"Sec. 3. Any person aggrieved by any assessment by the District against him of personal-property, inheritance, estate, business-privilege, gross-receipts, gross-earnings, insurance-premiums, or motor-vehicle-fuel tax or taxes or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the Board, provided such person shall first pay such tax, together with penalties and interest due thereon to the collector of taxes of the District of Columbia. The mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect of such taxes. The Board shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing. The Board may affirm, cancel, reduce, or increase such assessment.

"Sec. 4. (a) The decision of the Board may be reviewed by the court as hereinafter provided if a petition for such review is filed by either the District or the taxpayer within thirty days after the decision is rendered. Such petition for review shall be filed with the Board, and shall be in such form as the Board by regulation shall provide. Upon such review the court shall have the power to affirm, modify, or reverse the decision of the Board with or without remanding the case for hearing as justice may require. The court shall have the exclusive jurisdiction to review the decisions of the Board in the same manner and to the same extent as decisions of the United States District Court for the District of Columbia in civil actions tried with-

out a jury; and the judgment of the court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari in the manner provided in title 28, United States Code, section 1254, as amended. The court is authorized to adopt rules for the filing of the record on review, the preparation of the record for review, and the conduct of the proceedings upon such review.

* * *

"(c) The decision of the Board shall become final (1) upon the expiration of the time allowed for filing a petition for review, if no such petition be duly filed within such time; or (2) upon the expiration of time allowed for filing of petition for certiorari if the decision of the Board has been affirmed or the petition for review dismissed by the Court, or no petition for certiorari has been filed; or (3) upon denial of a petition for certiorari if the decision of the Board has been affirmed or the petition for review dismissed by the court; or (4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

"(d) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered unless within such thirty days either the District or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

"(e) If the decision of the Board is modified or reversed by the court and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered in accord-

ance with the mandate of the Court shall become final upon the expiration of thirty days from the time such decision of the Board was rendered, unless within such thirty days either the District or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

"(f) If the Supreme Court orders a rehearing, or if the case is remanded by the Court for rehearing and if (1) the time allowed for filing of a petition for certiorari has expired and no such petition has been duly filed; or (2) the petition for certiorari has been denied; or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

"(g) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of the issuance thereof, means the final mandate.

* * *

"Sec. 8. The Board shall adopt and promulgate rules of procedure in matters for determination by the Board under the provisions of this title.

"Sec. 9. The Board is hereby authorized and empowered to summon any person before it to give testimony on oath or affirmation or to produce all books, records, papers, documents, or other legal evidence as to any matter relating to this title; and the Board is authorized to administer oaths and to take testimony for the purposes of the administration of this title. Such summons may be served by any member of the Metropolitan Police Department. If any person having been personally summoned shall neglect or refuse to obey the summons issued as herein provided, then and in that event the Board may report that fact to the District Court of the United States for the District of Columbia or one of the justices thereof, and said court or any jus-

tice thereof hereby is empowered to compel obedience to said summons to the same extent as witnesses may be compelled to obey the subpenas of that court."

3.

Title 28, Section 46, United States Code, pertaining to United States Circuit Courts of Appeals, is involved:

"§46. **Assignment of judges: divisions: hearings: quorum.**

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

COURT RULE INVOLVED

The following rule of procedure before the District of Columbia Tax Court promulgated by the District of Columbia Tax Court is applicable:

"Rule 29—*Depositions and Discovery.*—Depositions shall be taken and used and discovery had in hearings before the Board in accordance with rules relating to depositions and discovery in force in the United States District Court for the District of Co-

lumbia at the time the taking and use of the depositions or discovery is sought, in so far as such rules are applicable. Depositions shall be mailed and addressed: 'Clerk, Tax Court for the District of Columbia, 322 Municipal Court—Civil Division Building, Washington, D. C.' "[1]

[1] This rule appears in Corporation Tax Service—State and Local—District of Columbia Tax Service, published by Commerce Clearing House, paragraph 13-830.